IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 29.09.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.938 of 1992

Palaniswami - D5 .. Appellant/5th defendant

vs.

1. Ramayammal - Plaintiff
2. Rangammal(died) - D-1
3. Kannappan - D-2
4. Kannammal - D-3
5. Vellayammal - D-4
6. Co-operative
   Urban Bank,
   Gobichettipalayam
   it its Secretary - D-6 .. Respondents/Plaintiff
   Defendants 1 to 4 & 6

Respondents 1 and 3 recorded as LRs of the deceased second respondent vide order of Court dt. 26.9.06 made in Memo dated. 20.7.06 (USSR No.3050/06)

Prayer: This Appeal has been filed against the Judgment and Decree dated 27.10.1992, passed in O.S.No.125 of 1988 on the file of the Subordinate Court, Gobichettipalayam.

For Appellant : Mr. V.Manohar

For Respondents : Mr.P.V.Ramachandran (for R1)
Mr. P.Duraisamy (for R3 to R5)
R6 - given up

JUDGMENT

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This appeal has been preferred against the decree and judgment passed in O.S.No.125 of 1988 on the file of the Subordinate Court, Gobichettipalayam. The fifth Defendant in the suit is the appellant herein.

2. The short facts relevant for the purpose of deciding this Appeal are as follows:

2(a) The first Defendant is the mother of the plaintiff. The second Defendant is the brother of the plaintiff and

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the third Defendant is the wife of the second Defendant. The fourth and fifth Defendants are the children of the 2nd and 3rd Defendants. The plaint schedule item No.1 and 2 are at Vellala Palayam village. The plaintiff's father Ramasamy Gounder had purchased the plaint schedule item properties on 21.2.1975 in his name as well as in the name of minor 5th Defendant. The plaint schedule item No.2 property was purchased by Ramasamy Gounder on 20.4.1959 and also on 28.10.1968. The above said deeds were taken by Ramasamy Gounder out of his own income. The plaint schedule properties are self acquired properties of Ramasamy Gounder.

2(b) The plaintiff's father Ramasamy Gounder was lying instooper from October 1987 in an unconscious state, and he died on 13.12.1987. During the life time of Ramasamy Gounder, the plaintiff and the Defendants have entered into a family arrangement. As per the family arrangement the plaint item No.1 & 2 were agreed to be partitioned into three shares after the death of plaintiff's father Ramasamy Gounder and out of the three shares one share is to be allotted to the plaintiff and other one to the second Defendant and remaining third share to the first Defendant till her life time and after her death plaintiff and the second Defendant have to partition the same in equal moites. It was also agreed upon between the plaintiff, first Defendant and second Defendant to take equal share in Rs.36,000/- deposited with Co-operative City Bank, Gobichettipalayam in fixed deposit by the said Ramasamy Gounder.

2(c) Ramasamy Gounder died at the age of 90 years. From the first week of November 1987 onwards the said Rangasamy Gounder was not in sound disposing state of mind. Ramasamy Gounder died intestate on 13.12.1987. The plaintiff filed the suit in O.S.No.570/87 before the District Munsif, Gobichettipalayam for permanent injunction against the Defendants. The Defendants in their written statement have stated that Ramasamy Gounder had executed a registered will on 24.11.1987 in favour of the fifth Defendant. The said will was not a genuine one. The Defendants have concocted and forged the said will. The plaintiffs, first Defendant and second Defendant are each entitled to 1/3 share in the plaint schedule property. The Defendants 3 to 5 and 6 are also necessary parties to the suit because the above said fixed deposit amount (item No.3) is lying with the said Co-operative City Bank.

2(d) The plaint schedule properties are in the joint possession of the plaintiff, first Defendant and second Defendant. During the year 1975, the fifth Defendant has no source of income to purchase the plaint schedule properties. The said property was purchased by Ramasamy Gounder in the name of the fifth Defendant also. So, the fifth Defendant cannot claim any right in respect of the said property on the basis of the sale deed dated 21.12.1975. Hence, the plaintiff has filed the suit for partition.

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3. The fifth Defendant has filed a written statement adopted by the Defendants 1 to 4 as follows:

All the averments in the plaint are not true. The allegation that Ramasamy Gounder was suffering from illness during October 1987 is not true. The allegation about the family arrangement is also not true. Ramasamy Gounder died on 13.12.1987, but his age was not 90 years at that time. Ramasamy Gounder had executed a registered Will on 24.11.1987 in favour of his grand son viz. the fifth Defendant herein, with a sound disposing state of mind. Neither the plaintiff nor the Defendants 1 to 4 have any right or title in respect of the plaint schedule property. Since the plaintiff had filed the suit while Ramasamy Gounder was alive, and he died on 13.12.1987 due to unbearable shame. The plaintiff had withdrawn the earlier suit filed by her viz. O.S.No.570/1987 and filed this suit. Out of grudge as she was not given any share in the property by Ramasamy Gounder, the plaintiff has filed this suit. Hence, the suit is liable to be dismissed.

4. The sixth Defendant in his written statement has contended that Ramasamy Gounder had deposited Rs.36,000/- in fixed deposit in the sixth defendant's Bank. He is prepared to abide by any direction given by this Court.

5. On the above pleadings the learned trial Judge had framed four issues and on the basis of the evidence, both oral and documentary has arrived at a conclusion that the plaintiff is entitled to a preliminary Decree for partition of the plaint schedule item No.1 and 3 properties and also 1/3 share in 8 ½ cents in the plaint schedule item No.2 property. Aggrieved by the findings of the learned District Munsif, the fifth Defendant has preferred this Appeal.

6. Now the point for determination in this Appeal is whether the appellant has derived any right and title in respect of the plaint schedule properties under Ex.B.2-Will dated 24.11.1987?

7. The Point:-

7(a)The learned District Munsif has rejected Ex.B.2-'will' only on the basis of trivial discrepancies in the evidence of D.W.2 & 3. The only point to be decided in this appeal is whether Ex.B.2-Will has been proved by the appellant or not? The will is to be proved as per Section 68 or under Section 69 and 71 of the Evidence Act. Section 68 of the Evidence Act runs as follows:

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there by an attesting witness alive and subject to the process of the Court and capable of giving

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evidence:

> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

7(b) Admittedly Ex.B.2 is a registered Will. One of the attestors to the Ex.B.2-Will has been examined on the side of the Defendants as D.W.2 viz. K.N.Rangasamy. D.W.2 in his evidence has deposed that Ramasamy Gounder was known to him for nearly 30 years and some 4 ½ years before his death, he called him and informed him that he proposed to execute a will and also informed him(D.W.2) that he is going to execute the Will in favour of the fifth Defendant-Palanisami since he has not given any money to him at the time of his marriage and that as per his instructions he(D.W.2) went and brought Seenivasan, the document writer. D.W.2 has categorically stated that on one Tuesday he went to Ramasamy Gounder's house and took him in an auto rickshaw to the document writer's office along with Kaithamalai, the other witness to Ex.B.2-Will and the Will was reduced to writing as per the instructions of Ramasamy Gounder and in the presence of him, other witness Kaithamalai and the document writer-Seenivasan, Ramasamy Gounder affixed his left thumb impression on Ex.B.2-Will, and then all the three went to the document writer's office and the will was registered on the same day.

7(c) The learned counsel appearing for the appellant would contend that the learned District Munsif has failed to take into consideration the fact that Ex.B.2-Will was a registered one and one of the attestors to the Will viz. D.W.2-K.N.Rangasamy was examined, as per Section 68 of the Evidence Act to prove the Will. The learned counsel for the appellant relied on the case reported in 2005(1) CTC 443 (Sridevi and others Vs. Jayaraja Shetty and others) and contended that onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding execution of Will, proof of testamentary capacity and proof of signature of testator as required by law is sufficient to prove the 'Will'. The short facts of the said case are that:

> " One Padmayya Kambali was the owner of the disputed suit properties. He had four sons and three daughters. Appellant Nos.1 & 2 are the daughters and appellant No.3 is the granddaughter through the third daughter who has died. Defendant-respondent Nos.1 to 12 are the grandchildren of Padmayya Kambali through his three sons and 13th Respondent is his 4th son. Padmayya Kambali died on 13.04.1976. At the time of his death he left behind

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vast properties some of which he had inherited from his brother and includes properties which vested in the State of Karnataka in respect of which compensation was paid. He executed a Will dated 28.03.1976(Ex.D.1) which was got registered on 11.09.1980.

Appellants filed the suit being Original Suit No.5 of 1981 for partition and separate possession of 7th share for each of the appellants of the properties described in the Schedules 'A', 'B', 'C' and 'D' attached to the plaint. Schedule properties 'A', 'B' and 'C' are immovable properties whereas 'D' schedule properties are movable properties. It was alleged in the plaint that the suit properties are the Joint Hindu Family properties and the appellants being the natural heirs are entitled to 7th share each in the suit properties.

It was averred that Padmayya Kambali executed the Will of his own while in sound disposing mind. At the time of execution of the Will, he was in possession of his physical and mental faculties.

The respondents examined five witnesses viz. two attesting witnesses, hand writing expert besides respondent No.3.

The trial Court held that the Will is genuine and valid and partly decreed the suit in respect of the properties which are not covered under the Will. On appeal the High Court dismissed the appeal. Hence the Second Appeal had been filed before the Honourable Apex Court of India. While disposing the said appeal the Honourable Apex Court of India has observed as follows:

> It is well settled proposition of law though the mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances have to be judged in the

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facts and circumstances of each particular case.

In the light of his settled position of the law, we have to examine as to whether the Will under consideration has been duly executed and the propounders of the Will had dispelled the suspicious circumstances surrounding the Will.

At the time of registration of the Will on 11.09.1980, the scribe and the two attesting witnesses had been produced before the Registrar. Their statements were recorded and only after satisfying himself, the Registrar registered the Will. The statement of the scribe and the two attesting witnesses before the Registrar are in harmony with the statements made by them in the Court. Another circumstances which was stressed during the course of the arguments by the counsel for the appellants was that although it was not necessary to get the Will registered, but still the respondents got it registered after a period of 4 years only to lend authenticity to the Will. According to Respondent No.13, the will was got registered on the advice of a lawyer to enable them to produce it before various authorities. Since we have come to the conclusion that the daughters were present at the time of execution of the Will by the testator and the execution of the same was disclosed at the time of final obeisance ceremony of the testator and that the Will had also been brought to the notice of the appellants in the year 1978 during the proceedings before the forest authorities, the registration of the Will in the year 1980 by itself does not cast doubt regarding the execution of the Will in the year 1976."

Ultimately the second appeal was dismissed by the Honourable Apex Court.

The facts of the above said case is squarely applicable to the present facts of the case. Here also Ex.B.2-Will was registered and one of the attesters to the Will was examined as D.W.2 and through D.W.2, Ex.B.2 has been proved by the appellant.

7(d) The learned counsel for the appellant also relied on the case reported in 1995(4) Supreme Court Cases 459 (Rabindra Nath Mukherjee Vs. Panchanan Banerjee). The facts of the said case are that a registered Will was executed by 90 years old lady depriving the natural heirs. Saroj Bala had executed a Will on 13.11.1966. She had also executed two codicils dated 2.2.1968 and 21.11.1969 and passed away on 13.1.1971 at the age of 90 years. Executors in the Will approached the Court of Additional District Judge, Alipore, for obtaining probate of the Will. On appeal, the High Court at Calcutta also took the same view. Hence, the Second Appeal was preferred

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before the Honourable Apex Court of India, where it has been held as follows:

> "Insofar as the third circumstance is concerned, we may first observe that witnesses in such documents verify whether the same had ben executed voluntarily by the person concerned knowing its contents. In case where a will is registered and the Sub-Registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, thefact that the witnesses to the document are interested loses significance. The documents at hand were registered and it is on record that the Sub-Registrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case.
>
> As to 'ubiquitous' Subodh, it may be said that somebody has to take necessary steps in such matters; but if he happens to be one close to the executor, some eyebrow is bound to rise. Even so, if there be other circumstances on record to show the voluntary character of the document, the eyebrows should get dropped down. And such circumstances were present in the case, which somehow missed the two courts bellow.
>
> Ultimately the second appeal was allowed by the Honourable Apex Court.

7(e) Another case relied on by the learned counsel for the appellant, AIR 1999 MADRAS 149 (A.Ramesh Vs. A.Manohar Prasad), wherein it has been held a follows:

> "Section 63 of the Indian Succession Act says:
>
> Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:
>
> (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or ark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The will shall, be attested by two or more witnesses, each of whom has seen the testator

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sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary"

Sub-Sections (a) and (b) deal with the signature or mark of the testator, or the signature of the person signing for him, and sub-section (c) deals with attestation by two or more witnesses and the mode of attestation.

Section 68 of the Indian Evidence Act says that if a document is required by law to be attested, it shall not be used as evidence until one of the attesting witnesses has been called for the purpose of proving its execution, and in the case of the Will such examination of one of such attesting witnesses is absolutely necessary.

Section 3 of the Transfer of Property Act defines 'attestation' under the expression attested as under:

" 'attested', in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Therefore, to prove the valid execution and attestation of the Will the above requirement as laid down should be fulfilled as per law."

7(f) The learned counsel for the appeal further relied on case reported in 2004(2) CTC 287 (Uma Devi Nambiar and others Vs. T.C.Sidhan) and contended that while interpreting the Will the

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foremost duty of the Court is to see the intention of the testator. The relevant observation of the Honourable Apex Court in the said dictum is as follows:

> "Will is a translation of the Latin word 'voluntas', which was a term used in the text of Raman Law to express the intention of a testator. It is of significance that the abstract term has come to mean that document in which the intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract-obligation, bond, contract, are examples (William's Wills and Intestate Succession, page 5). The word 'testament' is derived from 'testatio menties', it testifies the determination of the mind. A Will is thus defined by Ulpian's "Testamentum est mentis nostraejusta contestatio in id sollemniter facta to post martem nostrum valeat." Modastinus defines it by means of Volantas. It is 'voluntatis nostrae just sententia de co quod quis post mortem suam fietei vult (or velit)"; the word 'justa' implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law. It means, 'the legal declaration of a man's intentions, which will be performed after his death'. A last Will and testament is defined to be 'the just sentence of our Will, touching what we would have done after our death". Every testament is consummated by death, and until he dies, the Will of a testator is ambulatory. Name omne testamentum morte consummatum est; et voluntae testamentoric est embulatoria usque od mortem. (For, where a testament is, there must also of necessity by death of testator. For, a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth). A 'Will', says jarman, "is an instrument by which a person makes a disposition of his property to take effect after his deceased, and which is in its own nature ambulatory and revocable during his life". (Jarman, on Wills, Ist Edn., P.11). This ambulatory character of a Will has been often pointed out as its prominent characteristic, distinguishing it, in fact, form ordinary disposition by a living person's deed, which might, indeed postpone the beneficial possession or even a vesting until the death of the disposer and yet wold produce such postponement only by its express terms under an irrevocable instrument and a statement that a Will is final does not import an agreement not to change it. (Schouler's Law of Wills, S.326). A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the Statute. (Per Lord Penzance in Leimage Vs. Goodbhan, L.R.I.P. & D.57, Cited by Fry.J., in Green Vs. Tribe, (1878) 9 Ch D 231). In

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N.D.Bani's Law of Succession (Sixth Edition) also about position has been delineated. From Various decisions of this Court e.g Ram Gopal Vs. nand Lal, AIR 1951 SC 139, Gnambal Ammal Vs. Raju Ayyar, AIR SC 1951 SC 103, Raj Bajrang Bhadaur Singh Vs. Tahakurain Bakhtraj Kher, 1953 SC 7, Pearey Lal Vs. Rameshwar Das, AIR 1963 Sc 1703, Ramachandra Vs. Hilda Brite, AIR 1964 SC 1323 and Navneet Lal Vs. Gokul, AIR 1976 SC 794, the following principles are well established:

(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.

(2) In construing the language of the Will the Court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship the probability that he would use words in a particular sense. But all this is solely as an aid to arrive at a right construction of the Will and to ascertain the meaning of its language when used by that particular testator in that document.

(3) The true intention of the testator has to be gathered not by attaching importance in isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

(4) The Court must accept, if possible such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The Court will look at the circumstances under which the testator makes his Will, such as the state of his property of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further where on the two reasonable constructions would lead to intestacy that should be discarded in favour of a construction which does not create any such hiatus.

(5) To the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to

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it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy so that effect could be given as far as possible to every testamentary intention contained in the Will.

7(g) In the case on hand we can infer the intention of the testator, who had executed Ex.B.2-Will. In the Will he has stated that since he could not offer any amount to fifth Defendant his grandson, the testatrix herein, at the time of his marriage, had executed the Will thereby bequeathing plaint schedule item No.1 to 3 and on the date of the execution of the Will itself he had registered the same. It is seen from the evidence of one of the attesters to the Will viz. D.W.2 that only with a sound disposing state of mind, the testator viz. Ramasamy Gounder was taken to the Registrar's office along with other witness including D.W.2 and the scribe D.W.3 and the document was registered before the Sub-Registrar. There is no evidence on record to show that the Will was procured by fifth Defendant under vitiating circumstance.

7(h) The learned counsel appearing for the respondents would contend that there are two attesters to Ex.B.2-Will, but only one attester was examined and there are discrepancy in the evidence of D.W.2. The learned counsel appearing for the respondents contended that D.W.2 has not deposed to the fact that other attesters had not signed in the Will. But, D.W.2 in his evidence has clearly stated that he has signed before the Sub-Registrar in the Will and Kaithamalai, the other witness also signed in the Will before the Sub-Registrar, but he cannot say whether he and other witness Kaithamalai had signed in the Will with the same pen. The dictums relied on by the learned counsel for the respondents i.e. AIR 2003 SUPREME COURT 761 (Janki Narayan Bhoir Vs. Narayan Namdeo Kadam), AIR 1962 Supreme Court 567 (V 49 C 86) (Rani Purnima Debi and antoher Vs. Kumar Khagendra Narayan Deb and another) and AIR 1969 SUPREME cOURT 1147 (M.L.Abdhul Jabbar Sahib Vs. H.Venkata Sastry and Sons and others) also emphasis that to prove a Will atleast one of the attestors to the Will should be examined. Apart this settled proposition of law, there is nothings adverse to the claim of the appellant was indicated in those dictums.

7(i) Under such circumstance, I am of the considered view that the learned trial Court relying on minor discrepancies in the evidence of the second and third Defendants has erroneously come to a conclusion that Ex.B.2 was not proved in this case, which warrants interference from this Court. The point is answered accordingly.

8. In the result, the appeal is allowed and the decree and Judgment passed in O.S.No.125/1988 on the file of the Sub-Court Gobichettipalaym is set aside. The suit filed by the plaintiff in

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O.S.No.125/1988 is hereby dismissed. Considering the close relationship of the parties there is no order as to costs.

ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

The Subordinate Judge,
Gobichettipalayam.

ONE CC TO MR.P.V. RAMACHANDRAN, ADVOCATE SR 46552

A.S.No.938 of 1992

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